



**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

DA 01-2542  
October 30, 2001

Mr. Kurt Schueler  
President  
New England Mobile Communications, Inc.  
37 Ridgewood Drive  
Burlington, Vermont 05401

Dear Mr. Schueler:

This letter responds to your July 12, 2001 letter on behalf of New England Mobile Communications, Inc. ("New England").<sup>1</sup> New England requests a waiver of the interest associated with its installment payment obligations on a 218-219 MHz Service license, MSA 248A, Burlington, Vermont. For the reasons set forth below, we deny New England's request for waiver.

**1. Background**

On September 10, 1999, the Commission issued the *218-219 MHz Order*, which, among other measures, modified service and technical rules for the band, extended the license term from five to ten years, and adopted a financial restructuring plan for "Eligible Licensees."<sup>2</sup> Pursuant to the restructuring plan, Eligible Licensees were required to make elections by January 31, 2001<sup>3</sup> on a per license basis, choosing among three options: (i) Reamortization and Resumption of Payments; (ii) Amnesty; or (iii) Prepayment (Prepayment-Retain or Prepayment-Return).<sup>4</sup> If an Eligible Licensee elected Reamortization and Resumption of Payments ("the resumption option"), the licensee retained one or more of its licenses and remained in the installment payment plan.<sup>5</sup> Under the resumption option, the existing loans were

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<sup>1</sup> Letter to Ms. Magalie Roman Salas, Secretary, Office of the Secretary, Federal Communications Commission, from Mr. Kurt Schueler, President, New England Mobile Communications, Inc. (July 12, 2001) ("Request").

<sup>2</sup> In the Matter of Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, FCC 99-239, 15 FCC Rcd 1497, 1506, ¶ 15, 1517, ¶ 31 (1999) ("*218-219 MHz Order*"). Eligible Licensees are licensees that: (i) were current in installment payments as of March 16, 1998; (ii) were less than ninety days delinquent on the last payment due before March 16, 1998; or (iii) had properly filed grace period requests under the former installment payment rules. *218-219 MHz Order*, 15 FCC Rcd at 1520, ¶ 37.

<sup>3</sup> Wireless Telecommunications Bureau Announces Revised Election Date (January 31, 2001) and Amended Eligibility List for 218-219 MHz Service, *Public Notice*, DA 01-9, 16 FCC Rcd 5937 (2001) ("*Election Public Notice*").

<sup>4</sup> *Id.*; see also *218-219 MHz Order*, 15 FCC Rcd at 1518, ¶ 34.

<sup>5</sup> *218-219 MHz Order*, 15 FCC Rcd at 1522-25 ¶ 40-45; 47 CFR § 95.816(b).

“reamortized” over the remaining term of the license, *i.e.*, the Commission capitalized all accrued and unpaid interest into the principal amount as of the election date, taking into account the remedial bidding credit granted to winning bidders that met the small business qualifications for the auction.<sup>6</sup> New England, an Eligible Licensee,<sup>7</sup> participated in the restructuring plan and elected the resumption option.<sup>8</sup> For those Eligible Licensees who elected the resumption option, including New England, the first quarterly installment payment was due on April 30, 2001.<sup>9</sup> The Commission’s late payment rules for installment payments allow licensees to use two quarterly grace periods, subject to late payment fees, if the licensees require additional time to submit payment.<sup>10</sup> Therefore, in accordance with the Commission’s rules, any such licensee who fails to make the April 30, 2001 quarterly installment payment with the associated late fees within the two quarterly grace periods, *i.e.*, by October 31, 2001, will be in default, its license(s) will automatically cancel, and it will be subject to debt collection procedures.<sup>11</sup>

## **2. Discussion**

New England requests a waiver of the interest associated with its installment payment obligations to the Commission on the basis that it cannot raise sufficient capital to build out and pay the Commission for the license.<sup>12</sup> In essence, it appears that New England seeks to only pay the principal amount, *i.e.*, its winning bid without the associated interest.<sup>13</sup> In return for the Commission’s waiver of interest, *i.e.*, the amount previously capitalized into principal and future interest, New England proposes to use the resulting savings to build out and pay the entire principal balance owed on the license.<sup>14</sup> New England asserts that such an option would encourage licensees to build out their systems and satisfy the Commission’s objective of making the service available to the public while lowering the possibility that licensees will file for bankruptcy.<sup>15</sup>

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<sup>6</sup> 218-219 MHz Order, 15 FCC Rcd at 1524 ¶ 44, 1533-34, ¶¶ 61-63; 47 CFR § 95.816(b) (Allowing Eligible Licensees that elect resumption to continue to participate in the installment payment program).

<sup>7</sup> Election Public Notice, 16 FCC Rcd at 5943, Attachment A, List of Eligible Licensees.

<sup>8</sup> New England’s Election to Reamortization/Resumption of Payments under the installment payment plan, dated January 24, 2001; *Accepted Elections PN*, 16 FCC Rcd at 5908, Attachment A, List of Accepted Elections.

<sup>9</sup> Wireless Telecommunications Bureau Announces the Elections for the 218-219 MHz Service, *Public Notice*, DA 01-583, 16 FCC Rcd 5901, 5902 (2001) (“*Accepted Elections PN*”).

<sup>10</sup> 47 C.F.R. § 1.2110(g)(4)(i)-(ii).

<sup>11</sup> 47 C.F.R. § 1.2110(g)(4)(iv); *see also Accepted Elections PN*, 16 FCC Rcd at 5902.

<sup>12</sup> Request at 2.

<sup>13</sup> *Id.* We note that it is not clear if New England seeks waiver of all interest on the original principal amount, or all interest associated with the reamortized principal. Because we would deny either request, the precise nature of the request is irrelevant.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

To obtain a waiver of the Commission's rules, New England must show: (i) that the underlying purpose of the rule would not be served, or would be frustrated, by its application in this particular case, and that grant of the requested waiver would be in the public interest; or (ii) that the unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or that New England has no reasonable alternative.<sup>16</sup> For the reasons discussed below, we find that New England's waiver request fails to meet the Commission's standard for granting a waiver.

In adopting the restructuring plan, the Commission balanced the need to serve the public interest by affording relief to licensees with its duty to preserve the integrity of the auction process.<sup>17</sup> The Commission recognized that the options adopted might not suit every licensee's particular business plan.<sup>18</sup> The Commission also found that the restructuring plan provided licensees with sufficient time to make an informed decision as to which option to elect.<sup>19</sup> With respect to the resumption option, the Commission specifically found that it, coupled with the grace period rules, would provide specific relief for licensees that wished to retain their licenses but were experiencing financial hardship.<sup>20</sup> Requiring that licensees fulfill their payment obligations under the resumption option and thereby demonstrate their ability to pay as a condition to holding licenses ensures a fair and efficient licensing process.<sup>21</sup> It is also

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<sup>16</sup> 47 C.F.R. § 1.925.

<sup>17</sup> *218-219 MHz Order*, 15 FCC Rcd at 1499, ¶ 2 and 1520, ¶¶ 37-38; see Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Second Order on Reconsideration of the Report and Order and Memorandum Opinion and Order*, WT Docket No. 98-169, 15 FCC Rcd 25020, 25027, ¶ 12 (2000) ("*Second Order on Recon*").

<sup>18</sup> *Second Order on Recon*, 15 FCC Rcd at 25029, ¶ 19 (the Commission discussed the purpose and impact of the restructuring plan in rejecting a disaggregation option).

<sup>19</sup> *218-219 MHz Order*, 15 FCC Rcd at 1524, ¶ 44.

<sup>20</sup> *218-219 MHz Order*, 15 FCC Rcd at 1518-19, ¶ 34 and 1523, ¶ 43 (citing widespread support from commenters, the Commission stated that adoption of the resumption option would best serve the public interest). Notably, the Commission rejected an alternative resumption option that would have provided for an interest-free repayment plan. *218-219 MHz Order*, 15 FCC Rcd at 1523, ¶ 42 (citing CRSPI Reply Comments at 2). A subsequent challenge to the accrual of interest during the suspension period was also rejected by the Commission on the basis that the Commission, in relieving the licensees of one consequence of failing to make timely payment (*i.e.*, suspension of the automatic cancellation rules), did not intend to also relieve the licensees of all the consequences of failing to make payments. *Second Order on Recon*, 15 FCC Rcd at 25037-38, ¶¶ 38-39.

<sup>21</sup> See Letter to E. Ashton Johnston, Esq., Counsel for Vista Communications, Inc., from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, DA 01-1413, 16 FCC Rcd. 12430 (2001) ("*Vista*"); Letter to J. Jeffrey Craven, Esq., Counsel for IVIDCO, L.L.C., from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, DA 01-170, 16 FCC Rcd. 7236 (2001) ("*Ividco*"); In the Matter of Licenses of 21st Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services, Petition for Reconsideration, *Memorandum Opinion and Order*, FCC 00-434, 15 FCC Rcd 25,113 (2000); In the Matter of Southern Communications Systems, Inc. Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block Licenses in the Cleveland, TN BTA, *Memorandum Opinion & Order*, FCC 00-433, 15 FCC Rcd 25103, 25106, ¶ 7 (2000) ("*Southern Communications MO&O*"); see also In the Matter of Amendment of Part 1 of the Commission's Rules, Competitive Bidding Procedures, WT Docket No. 97-82, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, 4660- 4685 MHz, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 429, 430 ¶¶

fair to participants in the original auction and to those who made elections based upon the restructuring options, as contained in the *218-219 MHz Order*, and fosters the promotion of economic opportunity and competition in the marketplace.<sup>22</sup> Accordingly, New England has not demonstrated that the underlying purpose of the rule would not be served or would be frustrated by its application in this particular case.

New England's request, which is in essence an untimely request to reconsider the payment restructuring options, was submitted on July 12, 2001, significantly past the adoption of the *218-219 MHz Order*,<sup>23</sup> the Election Date,<sup>24</sup> and the first quarterly installment payment due date.<sup>25</sup> New England had the opportunity to return its 218-219 MHz license and receive amnesty on the outstanding amount of its debt obligation. However, with full notice of the elements of the Commission's restructuring options, New England elected resumption on January 24, 2001<sup>26</sup> and is now precluded from opting out of its election.<sup>27</sup> If New England subsequently realized that it, in fact, lacked sufficient resources to both pay for and build out its license, New England bore that risk when it made its election. These are not unique circumstances sufficient to justify waiver of our late payment rules.<sup>28</sup> Accordingly, New England's request is denied.

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95-96 (1998).

<sup>22</sup> See *Vista*, 16 FCC Rcd. 12430; *Ividco*, 16 FCC Rcd. 7236; *Southern Communications MO&O*, 15 FCC Rcd at 25106, ¶ 7.

<sup>23</sup> The *218-219 MHz Order* was adopted on September 7, 1999. *218-219 MHz Order*, 15 FCC Rcd at 1497. In the *218-219 MHz NPRM*, the Commission sought comment on its proposal to permit reamortization of principal and interest installment payments for non-defaulted 218-219 MHz licenses. Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service and Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services, *Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 FCC Rcd 19064, 19085-87, ¶¶ 37-39 (1998) ("*218-219 MHz NPRM*"). New England had the opportunity to participate in the restructuring of the service by commenting on the reamortization of principal and interest payments but opted not to do so. See *218-219 MHz Order*, 15 FCC Rcd at 1565-66, Appendix A, Lists of Commenters and Reply Commenters; see also, *Second Order on Recon*, 15 FCC Rcd at 25045, Appendix A, List of Petitioners.

<sup>24</sup> Eligible Licensees were required to make their elections by January 31, 2001. *Election Public Notice*, 16 FCC Rcd at 5938.

<sup>25</sup> As stated previously, the first quarterly installment payment was due on April 30, 2001.

<sup>26</sup> New England's Election for Reamortization/Resumption of Payments under the installment payment plan, dated January 24, 2001.

<sup>27</sup> See *Election Public Notice*, 16 FCC Rcd at 5937-38 ("Accordingly, Eligible Licensees must make their elections by 7 p.m., Wednesday, January 31, 2001. **NO ELECTIONS OR CHANGES TO ELECTIONS WILL BE ACCEPTED AFTER 7 P.M. ON THE ELECTION DATE.**") (no emphasis added).

<sup>28</sup> See also *Southern Communications MO&O*, 15 FCC Rcd at 25107, ¶ 10 (holding that a failure to appropriately manage business arrangements does not justify waiver of the automatic cancellation rule); *BDPCS, Inc.*, Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules, *Memorandum Opinion and Order*, 12 FCC Rcd 3230, 3235, ¶ 8 (1997) (holding that the failure of a third party to perform its contractual obligation does not constitute a special circumstance justifying a waiver of the down payment default rule).

*Mr. Kurt Schueler*  
*October 30, 2001*

This action is taken pursuant to Sections 4(i), 4(j), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 309(j), under authority delegated pursuant to Section 0.331 of the Commission's rules.<sup>29</sup>

Sincerely,

Margaret W. Wiener  
Chief, Auctions and Industry Analysis Division  
Wireless Telecommunications Bureau

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<sup>29</sup> 47 C.F.R. § 0.331.